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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 812

MILES LABORATORIES, INC.,

Petitioner,

vs.

HENRY J. FROLICH, D/B/A ENCINO CHEMICALS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

WILLIAM T. WOODSON,
BEVERLY W. PATTISHALL,
2430 Prudential Plaza,
Chicago 1, Illinois,
REGINALD E. CAUGHEY,
811 West Seventh Street,
Los Angeles, California,
Attorneys for Petitioner.

WOODSON, PATTISHALL & GARNER,
2430 Prudential Plaza,
Chicago 1, Illinois,
LYON & LYON,
811 West Seventh Street,
Los Angeles, California,
Of Counsel.

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MILES LABORATORIES, INC.,
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HENRY J. FROLICH, D/B/A ENCINO CHEMICALS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Miles Laboratories, Inc., respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review a final judgment of that Court affirming a judgment of the United States District Court, Southern District of California, Central Division.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit is reported in 296 F. 2d 740, 132 U. S. P. Q. 122. A copy of the opinion and dissenting opinion are attached to this petition as *Appendix A*, page 13.

The judgment of the Court of Appeals is attached hereto as *Appendix B*, page 15.

The opinion of District Court is reported in 195 Fed. Supp. 256. A copy of the opinion of the District Court is attached to this petition as *Appendix C*, page 16.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 26, 1961.

Jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Jurisdiction of the Court of first instance was invoked under 28 U. S. C. 1338 and 15 U. S. C. 1116.

QUESTIONS PRESENTED.

1. Where confusion is proved in a trademark infringement action, is a court permitted to hold that there is no infringement in view of the provision in the Federal Trademark Act of 1946 (15 U. S. C. A. 1114(1)) which prescribes that likelihood of confusion is the test of infringement?

2. The Court of Appeals for the Ninth Circuit has rendered a decision which is in conflict with decisions of other Circuits on the question of the application of Section 15 U. S. C. 1114(1) of the Federal Trademark Act of 1946 in determining trademark infringement.

ARGUMENT.

THE DECISION BELOW DID NOT APPLY THE TEST OF TRADEMARK INFRINGEMENT AS PRESCRIBED BY THE STATUTE.

There was a divided opinion by the Court of Appeals. The majority opinion merely affirmed the judgment of the District Court which held that the accused mark MILK-O-SELTZER for a medicinal preparation designed for the relief of headache and upset stomach did not infringe the federally registered trademark ALKA-SELTZER for a similar product; nor did such use constitute unfair competition. The minority opinion stated in part:

> "I cannot rationally escape the conviction that such similarity was deliberately intended by the appellee. To me it is a clear case of imitation. I cannot rationally escape the conviction that some confusion of the consumer must result." (Appendix A, page 14.)

It is apparent that the minority opinion was applying the test of likelihood of confusion of source of defendant's goods which is the test of trademark infringement prescribed by the federal Trademark Act of 1946, which states (15 U. S. C. 1116):

> "Any person who shall, in commerce, (a) use without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; * * * shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided. * * *"

It is likewise apparent that neither the majority opinion of the Court of Appeals nor the District Court applied

the test of likelihood of confusion of source of goods in deciding the case.

The District Court did not make and enter findings of fact and conclusions of law. It stated that the opinion would serve as findings of fact and conclusions of law.

The District Court in its opinion defined the issues as follows:

> "The issue here is whether or not the name MILK-O-SELTZER when affixed to products used for the relief of headaches and upset stomach, is likely to cause confusion, mistake or deception in the minds of purchasers." (Appendix C., page 19.)

By the above statement the Court was apparently raising the issue as to confusion of goods. The Court continued:

> "Or, again, whether a consumer, using that degree of care which a reasonable man would use in purchasing goods of this description, intent on purchasing a product for the relief of headaches and upset stomach would buy MILK-O-SELTZER thinking that that product was made or endorsed by Miles Laboratories." (Appendix C., page 19.)

Now the Court was obviously referring to confusion of source of the goods.

The evidence demonstrated confusion in the minds of the public as to the source of defendant's product.

Dr. Floyd L Ruch, Professor of Applied Psychology at the University of Southern California conducted a public reaction test in the Los Angeles, California area to ascertain if the public would attribute defendant's goods bearing the accused mark as coming from the same source as the goods bearing the registered trademark. Two thousand persons were interviewed. It was Dr. Ruch's conclusions from this public reaction test that at least 20 percent of the public in the Los Angeles area would attribute defendant's product to the same source as plaintiff's product (Rec. 91).

Another type of public reaction test was made. It was a talking motion picture which showed that thirty percent of the persons interviewed attributed defendant's product to the same source as plaintiff's product (Rec. 139).

The District Court stated the proper method but did not follow it, as to how a court should go about deciding a trademark infringement case when it said:

> "The Court is not required to consider the marks in a vacuum, but rather to assess the actions of human consumers in the marketplace." (Appendix C, page 24.)

The public reaction test conducted in this case by Dr. Ruch was designed for the purpose of assessing the actions of consumers in the marketplace, so that the Court would not have to consider the marks in a vacuum. But quite obviously the court did not give proper weight to the evidence of the reactions of consumers in the marketplace and did consider the marks in a vacuum as it said a court should not do. The public reaction tests showed confusion as to the source of defendant's product, yet the District Court held no infringement. It apparently disregarded its above stated observation and did consider the marks in a vacuum by making a side-by-side comparison of the marks in the courtroom.

The District Court in commenting on the public reaction tests, said:

> "All of this evidence was considered admissible over vague objections of Mr. Frolich. Although there is authority to the contrary, see *The Standard Oil Company* v. *Standard Oil Company*, *supra*. 252 F. 2d 65, 75. this court is of the opinion that such evidence is admissible hearsay. As in the *Standard Oil* case, the courts sometimes consider that the credibility of the persons taking the interview, and not that of the subjects who are questioned, is at issue.
>
> "However, in order for the evidence to be relevant, the trier of fact must assume that each of the subjects

was telling the truth. In essence, each of the subjects who answered as Miles wished them to answer was saying, 'I think that the maker of MILK-O-SELTZER may also make ALKA-SELTZER.' From these statements, the trier must make the inferential step that the statements were true reflections of the subject's mental reactions.

"The so-called hearsay dangers evolve from this inferential step since the subjects are not under oath nor in court for cross-examination.

"However, it is familiar law that hearsay evidence is admissible to show the state of mind of the extra-judicial declarant, where such is relevant, *Marcalus Manufacturing Co.* v. *Watson*, D. C., 1957, 156 F. Supp. 161, 164, affirmed Per Curiam 258 F. 2d 151; *Bridge* v. *Ruggles*, 1927, 202 Cal. 326; and note Rule 43(a) F. R. C. P. Even without this convenient pigeonhole, hearsay is admissible where, as here, there is little danger that all of the subjects would falsify their feelings and it would be impossible for the court to consider the testimony of each." (Appendix C., pages 27, 28.)

The District Court by holding that the confusion evidence was admissible and that the subjects interviewed were telling the truth when they said that they thought that the maker of MILK-O-SELTZER also made ALKA-SELTZER, was virtually making a finding of likelihood of confusion. Notwithstanding this implied finding the court held no infringement. This holding was contrary to the evidence and contrary to the test of infringement prescribed by the statute.

THE UNUSUAL PREDICAMENT OF THE DISTRICT COURT ON THE QUESTION OF CONFLICTS IN THE CIRCUITS.

The District Court stated that the only recent case arising within the Ninth Circuit which it had found where the products were very similar and the question turned on the similarity of the names was that of *Vita-Var Corporation* v. *Alumatone Corporation*, 83 F. Supp. 214 (S. D. Cal., 1949). The court then said:

"Until our circuit more clearly defines these cases, it seems that the *Vita-Var* case is more indicative of the position of this Circuit than the decisions of other circuits which may go further in granting trade-mark protection. If this court were sitting in the Third Circuit, it might feel constrained by the opinion in *Q-Tips, Inc.* v. *Johnson & Johnson, supra;* of in the Second Pond's, Inc., 1960, 281 F. 2d 755; or in the Seventh Pond's, Inc., 1960, 281 F. 2d 755; 10 or in the Seventh Circuit, by *G. D. Searle & Co.* v. *Chas. Pfizer & Co., Inc.* 1959, 265 F. 2d 385; cert. den. 361 U. S. 819; to reach a different result because of a possible trend in these circuits." (Appendix C., page 21.)

There is no reason, except for the conflict in the Circuits, for the court sitting in the Ninth Circuit to decide the present case differently than it would have decided it had it been sitting in the Second, Third, or Seventh Circuit.

An accused mark that would be held to infringe in the Second, Third and Seventh Circuits should likewise be held to infringe in the Ninth Circuit. It is doubtful that the public in the Ninth Circuit is more discerning than it is in the Second, Third and Seventh Circuits.

The reason given by the District Court, rather apologetically, for its decision was that it was following the decision in *Vita-Var Corporation* v. *Alumatone Corporation*, 83 F. Supp. 214 (S. D. Cal., 1949). That was a District Court case which held that ALUMATONE did not infringe ALUMIKOTE for paint products. That case had to be decided "in a vacuum" by a mere side-by-side comparison of the marks in the courtroom since there was no evidence of confusion as to source of the goods bearing the accused mark.

The statement by the District Court that if it were sitting in the Second, Third or Seventh Circuit it might feel constrained to reach a different result, clearly indicates that the District Court realized that the decisions of the Ninth

Circuit are in conflict with decisions of the Second, Third and Seventh Circuits in trademark infringement cases.

The decision of the court below is in conflict with decisions of other circuits on the question of confusion of source of goods bearing accused marks in such cases as:

Aunt Jemima v. *Rigney*, 2 Cir., 247 Fed. 407 (1917).

E-Z Waist Co. v. *Reliance Mfg. Co.*, D. C. Cir., 286 Fed. 461 (1923).

Wall v. *Rolls-Royce*, 3 Cir., 4 Fed. 2d 333 (1925).

Yale Electric Corp. v. *Robertson*, 3 Cir., 26 Fed. 2d 972 (1928).

L. E. Waterman Co. v. *Gordon*, 2 Cir., 72 Fed. 2d 272 (1934).

Vogue v. *Thompson-Hudson Co.*, 6 Cir., 300 Fed. 509 (1924).

THE DECISION BELOW IS IN CONFLICT WITH CONGRESSIONAL PURPOSE AND INTENT.

The test of trademark infringement under the Trademark Act of 1946 is use of a reproduction, counterfeit, copy, or colorable imitation on any goods or services in connection with which such use is likely to cause confusion, mistake, or deception of purchasers as to source of origin of such goods or services. How could Congress have spoken more clearly that the test of infringement is confusion of purchasers as to source of goods bearing the accused mark.

House Committee Report No. 944, 76th Congress, in reporting favorably the then pending trademark bill said:

> "To protect trade-marks, *i. e.*, marks which permit the goods of different makers to be distinguished from each other, is to promote competition and is sound public policy.
>
> "The protection which is accorded is *security against misrepresentation as to the origin of goods*, by sup-

> pressing imitations which are calculated to mislead buyers into the belief that the goods of one maker are those of another" (Emphasis ours).

Senate Committee Report No. 1562, 76th Congress, in reporting favorably the same bill said:

> "The public interest is two-fold; First, protection from deceit, in achieving a substantially uniform practice by which a mark attaching to an article of commerce may identify such article *as to source* or quality or type; thus, the public desiring that article, and having become familiar with the trademark identifying it, may seek to purchase and purchase an article so identified" (Emphasis ours).

It is clear from the above reports that Congress intended the test of trademark infringement to be confusion of source of goods. That intent was enacted into law. Some Circuits follow this mandate of the statute. All should.

The Ninth Circuit did not apply the test prescribed by the statute in deciding the present case, since there was evidence of confusion, and there can be no more positive proof of likelihood of confusion than evidence of actual confusion (*Standard Oil Co. (Ind.)* v. *Standard Oil Co. (Ohio)*, 10 Cir., 252 F. 2d 65, 74). Courts should follow the mandate of a federal statute in deciding a trademark case just the same as they follow the mandate of a federal statute in any other type of case.

To bring about uniformity in the decisions of the various Circuits in trademark cases, it would be most helpful if this Court should give construction to the remedial section (15 U. S. C. 1114(1)) of the trademark statute of 1946, not heretofore considered by this Court.

This Court granted certiorari to construe the Trademark Act of 1920, in the case of *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corporation*, 305 U. S. 315. Mr.

Justice Reed stated the purpose for granting the writ as follows:

> "We granted certiorari on account of the importance in trademark law of the issues of the descriptive character of the mark and the effect of its acquired meaning under the Trademark Act of 1920."

It is felt that it is of greater importance that this Court construe the remedial section of the federal Trademark Act of 1946 than it was to construe the effect of the registration of a descriptive trademark under the Trademark Act of 1920.

CONCLUSION.

The Court of Appeals for the Ninth Circuit, in a divided opinion, has decided a case contrary to the mandate of a federal statute. There has been no construction of this statute by this Court. Fundamental conflict exists between the various Circuits as to the construction and application of the remedial section of the new Trademark Act. It is of the utmost importance that this Court settle the question. The questions presented by this petition are of broad public consequence.

Respectfully submitted.

WILLIAM T. WOODSON,
BEVERLY W. PATTISHALL,
2430 Prudential Plaza,
Chicago 1, Illinois.

REGINALD E. CAUGHEY,
811 West Seventh Street,
Los Angeles, California,
Attorneys for Petitioner.

WOODSON, PATTISHALL & GARNER,
2430 Prudential Plaza,
Chicago 1, Illinois.

LYON & LYON,
811 West Seventh Street,
Los Angeles, California,
Of Counsel.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

MILES LABORATORIES, INC.,
Appellant,
vs.
HENRY J. FROLICH, D B A ENCINO CHEMICALS,
Appellee.

No. 17,491
Dec. 26, 1961.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Before: BARNES, MERRILL and BROWNING, *Circuit Judges*.

Per Curiam:

The appellant contends that appellee's use of the trademark MILK-O-SELTZER in the sale of a medicinal preparation designed for the relief of headache and upset stomach infringes the appellant's trademark ALKA-SELTZER, used for the same purposes, and also that such use constitutes unfair competition. The United States District Court for the Southern District of California, Central Division, held to the contrary. We affirm the judgment of the District Court on the basis of the well-reasoned opinion of Judge M. D. Crocker, 195 F. Supp. 256.

MERRILL, *Circuit Judge*, DISSENTING:

I dissent and would reverse.

These parties are and will continue to be in competition. Nothing we do here will alter that fact. The question is

not as to whether they may compete with each other but as to the names under which they may compete with each other.

One need only repeat these two names one after the other, like an oldfashioned college cheer, to perceive the extraordinary similarity in sound. I cannot rationally escape the conviction that such similarity was deliberately intended by the appellee. To me it is a clear case of imitation. I cannot rationally escape the conviction that some confusion of the consumer must result.

I do not feel it proper or necessary in the name of fair competition that a newcomer to this highly competitive arena should, simply because he is a newcomer and competitively weak, be permitted to hitch a ride from his established competitors. This is precisely what we do here when we permit him to appropriate as his appellation a sound which has by his competitor been made to ring so familiarly upon the public ear.

(Endorsed) Opinion and Dissenting Opinion Filed Dec. 26, 1961.

FRANK H. SCHMID,
Clerk.

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the Ninth Circuit.

MILES LABORATORIES, INC., *Appellant*, vs. HENRY J. FROEICH, ETC., *Appellee*.	No. 17491.

JUDGMENT.

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 26, 1962.

APPENDIX C.

In the United States District Court,
Southern District of California,
Central Division.

No. 337-60 Mc.

MILES LABORATORIES, INC.,
Plaintiff,
vs.
HENRY J. FROLICH, d. b. a. ENCINO CHEMICALS,
Defendant.

OPINION.

Appearances: For the plaintiff Lyon & Lyon by Reginald E. Caughey, Los Angeles, California; Woodson, Pattishall & Garner, by Lewis Garner, Chicago, Illinois. For the defendant: Henry J. Frolich, in Propria Persona, Encino, California.

Miles Laboratories, Inc., an Indiana corporation (having its principal place of business in that state and doing business in the State of California)[1] has, since 1930, been continuously engaged in the manufacture, advertising, distri-

1. Co-Plaintiff Miles California Company, a California corporation, merged into plaintiff Miles Laboratories, Inc., during the course of the trial. Accordingly, Miles California Company has been dismissed as a party to the action.

bution and sale of an anti-acid effervescent preparation, under the trade-mark Alka-Seltzer. The trade-mark has been duly registered under the federal trade-mark acts of 1905, 1942 and 1946[2] and under appropriate California statutes. Reg. No. 510,330 has now become incontestable under the provisions of 15 U. S. C. 1065.

Plaintiff has sold millions of dollars worth of its product on a nationwide scale since 1930, or shortly thereafter.

Defendant, Henry J. Frolich, is a citizen of California, doing business under the name of Encino Chemicals. At present, defendant produces limited quantities of home remedies. Among these is a medical preparation of the same general nature and designed for the same purposes as plaintiff's Alka-Seltzer product, which defendant sells under the name Milk-O-Seltzer.

Miles Laboratories seeks to have this court enjoin defendant from using the name Milk-O-Seltzer on his products, and requests an accounting for damages.

The court holds that the name Milk-O-Seltzer does not infringe the trade-mark Alka-Seltzer. Injunction and accounting are denied.

Jurisdiction.

Congressional power to enact legislation to protect trademarks is derived from the commerce clause of the Constitution and not from specific provisions as in the case of patents or copyrights. Trade-Mark Cases, 1879, 100 U. S. 82. *Fairway Foods Inc. v. Fairway Markets*, 9 Cir., 1955, 227 F. 2d 193, 196, 197, and see Commentary on Lanham Trade-Mark Act by Daphne Robert, 15 U. S. C. A.

Being so derived, protection under the Lanham Act, 15

2. Registered June 9, 1931, Reg. No. 283,831; May 31, 1949, Reg. No. 510,330; September 16, 1958, Reg. No. 667,053 respective to the various acts.

U. S. C. A. § 1051-1127, is limited to "any person who shall, in commerce . . ." do the prohibited acts, (§ 1114).[3] "Commerce" is defined as "all commerce which may lawfully be regulated by Congress." (§ 1127).

Although jurisdiction of the federal courts cannot rest solely upon stipulation. [*People's Bank v. Calhoun*, 1880, 102 U. S. 256] or waiver [*United States v. Griffin*, 1937, 303 U. S. 226] this court has jurisdiction based on the Lanham Act. Defendant admitted allegations of the complaint and stated in his deposition that he has sold his product in interstate commerce. Moreover, defendant has applied for registration of Milk-O-Seltzer alleging that it has been used in interstate commerce. This use was not extensive, but defendant indicated that he intended to expand his production and sales. Under such circumstances the court has jurisdiction. A single actual sale or use by defendant in another state would be sufficient interstate commerce to give federal protection under the Act, *New England Duplicating Co. v. Mendes*, 1 Cir., 1951, 190 F. 2d 415, 417. See also, *Stauffer v. Exley*, 9 Cir., 1950, 184 F. 2d 962, and Moore's Federal Practice, vol. 1, pp. 610-611.

PRINCIPAL ISSUE.

The Lanham Act protects registered marks against an infringer's use in commerce, without consent, where "such use is likely to cause confusion, or mistake or to deceive purchasers as to the source of origin of such goods or services," (§ 1114).[4]

3. This section later adds that the intent of Congress is "to protect registered marks used in such commerce from interference by State or territorial legislation."

4. An excellent summary of the pertinent issues by Judge Kaufman appears in *Societe Anonyme, Etc. v. Julius Wile Sons & Co.*, S.D.N.Y., 1958, 161 F. Supp. 545, 547, holding that "Frappemint" did not infringe "Freezomint".

"The touchstone of infringement is a similarity likely to

Hence, the issue here is whether or not the name Milk-O-Seltzer, when affixed to products used for the relief of headaches and upset stomach, is likely to cause confusion, mistake or deception in the minds of purchasers, *Time, Inc. v. T. I. M. E., Inc.*, S. D. Cal., 1954, 123 F. Supp. 446, 454, and numerous cases cited there. Or again, whether a consumer, using that degree of care which a reasonable man would use in purchasing goods of this description, intent on purchasing a product for the relief of headaches and upset stomach would buy Milk-O-Seltzer thinking that that product was made or endorsed by Miles Laboratories.

Essentially, the question is one of fact, *G. D. Searle & Co. v. Chas. Pfizer & Co.*, 7 Cir., 1956, 231 F. 2d 316, to be decided, not by expert opinion, but by the Court, *Standard Oil Company v. The Standard Oil Company*, D. C. Wy., 1956, 141 F. Supp. 876, 890, aff. 252 F. 2d 65, *Societe Anonyme v. Julius Wile Sons & Co., supra*, Callman, Unfair Competition and Trade-Marks, 2d Edition, p. 1570.

cause confusion or mistake or to deceive purchasers.' 60 Stat. 437 (1946) 15 U.S.C.A. § 1114(1)(a). It is not similarity itself which provides the basic test but whether such similarities as may appear from a comparison of the two marks will provoke confusion among the buying public. This determination that I am called upon to make—whether confusion is or is not likely to arise—does not readily lend itself to resolution by scientific appraisement or comparison. Rather, a finding on infringement is by necessity a subjective determination by the trial judge based on his visceral reactions as to the likelihood of confusion the allegedly infringing mark will create in the minds of the public. As noted by one court, in situations of this kind of Judge 'can only contemplate, speculate, and weigh the probabilities of deception arising from the similarities.' *Colburn v. Puritan Mills, Inc.*, 7 Cir., 1939, 108 F. 2d 377, 378."

5. Not merely "careless and indifferent buyers," *S. C. Johnson & Son, Inc. v. Johnson*, 6 Cir., 1959, 266 F. 2d 129, cert. den. 361 U. S. 820. See also *Pennzoil Co. v. Crown Central Petroleum Corporation*, D. Md., 1943, 50 F. Supp. 891, 900, aff. 140 F. 2d 387, cert. den. 322 U. S. 750, holding that "Greenzoil" does not infringe "Pennzoil."

Mindful that the twofold purpose of the Act is (1) "To protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get," and (2) to protect the owner who has spent time and money in his investment "from its misappropriation by pirates and cheats," Senate Committee Report, 1946, Cong. Serv. p. 1274,[6] the court has considered the following factors:

TREND OF THE CASES.

It has been correctly pointed out that little can be gained from the citation of specific cases since each must be decided on its particular facts, *Green* v. *Ludford Fruit Products*, S. D. Cal., 1941, 39 F. Supp. 985, 988 and 989, appeal dismissed 126 F. 2d 468.[7] However, it is important to note the trend of decisions within the circuit by which this court is bound, *Q-Tips, Inc.* v. *Johnson & Johnson*, 3 Cir., 1953, 206 F. 2d 144, 147, 148, cert. denied.[8]

Recent trade-mark cases in this circuit have involved virtually identical marks on different products, *Sunbeam Furniture Corp.* v. *Sunbeam Corp.*, 9 Cir. 1951, 191 F. 2d 141, rehearing denied; 191 F. 2d 731; *Sunbeam Lighting Co.* v. *Sunbeam Corporation*, 9 Cir. 1950, 183 F. 2d 969, cert. den. 340 U. S. 920; *Time, Inc.* v. *T.I.M.E., supra;* or marks on business establishments, where the customers might be different; *Stork Restaurant, Inc.* v. *Sahati*, 9 Cir. 1948, 166 F. 2d 348; *Brooks Bros.* v. *Brooks Clothing of California, Ltd.*, S. D. Cal. 1945, 60 F. Supp. 442, affirmed,

6. See also the general discussion by Goodman, J. in *Springfield Fire and Marine Insurance* v. *Founders' Fire and Marine Ins. Co.*, N. D. Cal., 1953, 115 F. Supp. 787, 792.

7. See also the apparently irreconcilable cases cited in *Bon-Ami Co.* v. *McKesson & Robbins, Inc.*, C. C. P. A., 1938, 93 F. 2d 915, 916.

8. Cert. den. (Two cases) 346 U. S. 867 and 347 U. S. 935.

adopting the opinion of the District Court, 158 F. 2d 798, cert. den. 331 U. S. 824; or a store and a product, *Safeway Stores, Inc.* v. *Dunnell*, 9 Cir. 1949, 172 F. 2d 649, cert. den. 337 U. S. 907.

The only recent case arising within this circuit which the court has found (and none was cited) where the products were very similar and the question turned on the similarity of the names is that of *Vita-Var Corporation* v. *Alumatone Corporation*, S. D. Cal., 1949, 83 F. Supp. 214. In that case, Judge Yankwich, later Chief Judge of this District, held that "Alumatone" was not confusingly similar to "Alumikote" where the names were both applied to aluminum paint products. In that case, as here, part of the names was identical; there was a vowel sound which might be slurred to sound similar, and the third syllable was different. There, as here, the products were both to be used for the same purpose, although they were in different form. There, one product was a ready-mix aluminum paint whereas the other was a flaked pigment which was to be mixed with an attached liquid; here, one of the products consists of tablets which are to be dissolved in water, and the other, a powder which is similarly dissolved. There, as here, see *infra*, there is no indication that the labels were similar. If anything, the case before this court now is a stronger one for denying relief since part of the alleged infringing mark is a familiar English word which is unlikely to be confused.

Until our circuit more clearly defines these cases, it seems that the Vita-Var case is more indicative of the position of this circuit than the decisions of other circuits which may go further in granting trade-mark protection. If this court were sitting in the Third Circuit, it might feel constrained by the opinion in *Q-Tips, Inc.* v. *Johnson & John-*

son, supra;[9] or in the Second *Pond's, Inc.*, 1960, 281 F. 2d 755;[10] or in the Seventh *Pond's, Inc.*, 1960, 281 F. 2d 755; 10 or in the Seventh Circuit, by *G. D. Searle & Co. v. Chas. Pfizer & Co., Inc.* 1959, 265 F. 2d 385, cert. den. 361 U. S. 819;[11] to reach a different result because of a possible trend in those circuits. Admittedly, courts of this circuit have cited each of the above with approval for the general proposition that higher standards of fair business are now required.[12] However, the court has found no case in this circuit holding marks as dissimilar as the ones in this case to be infringing.

Miles Laboratories itself has made numerous forays into the courts to protect their Alka-Seltzer name and have met with varying success. See, for example, *American Bio-Chemical Corporation* v. *Coe*, D. C. Dist. Col., 1943, 51 F. Supp. 430 (wherein "Vita-Seltzer" not allowed registration); *Miles Laboratories, Inc.* v. *United Drug Co.*, C. C. P. A., 1940, 112 F. 2d 814 (wherein "Rex-Seltzer" was allowed registration); *Miles Laboratories, Inc.* v. *Goodfriend, Comm.*, 1955, 106 U. S. P. Q. 336 (wherein "Carba-Seltzer" was refused registration).

The court is particularly impressed with the result in *Miles Laboratories* v. *Pepsodent Co.*, C. C. P. A., 1939, 104 F. 2d 205. Although decisions of the Court of Customs

9. See also *Morgenstern Chemical Co.* v. *G. D. Searle & Co.*, 3 Cir. 1958, 253 F. 2d 390, cert. den. 358 U. S. 816.

10. But see *Upjohn Company* v. *Schwartz*, 2 Cir., 1957, 246 F. 2d 254, 262 ("Syrocol" does not infringe "Cheracol"); *Warner Brothers Company* v. *Jantzen, Inc.*, 2 Cir., 1957, 249 F. 2d 353 ("Curvallure" does not infringe "A'Lure"); and the very persuasive *Societe Anonyme, etc.* v. *Julius Wile Sons & Co.*, S. D. New York, *supra*.

11. Another opinion on this case is cited, *supra*.

12. See, for example, *Ramirez & Ferrand Choli Co.* v. *Las Palmas Food Company, Inc.*, S. D. Cal., 1956, 146 F. Supp. 594, at 605, citing *Q-Tips, Inc.*, v. *Johnson & Johnson*, affirmed per curiam, 245 F. 2d 874, cert. den. 355 U. S. 927.

and Patent Appeals have no binding effect on this court, they carry particular weight since they are decided by a three judge court which specializes in this type of case. In *Pepsodent*, the court held "Pepso-Seltzer" registerable as not confusingly similar to "Alka-Seltzer" when affixed to similar products. As in the *Alamatone* case, *supra*, the alleged infringing mark was considerably closer than the mark in the case under consideration, since the middle vowel was connected to the first syllable rather than separated by a hyphen as in this case. Moreover, the first syllable there does not have the descriptive quality which "milk" has in the present case.

ORAL SIMILARITY:

Emphasizing that drug products are frequently requested orally, plaintiff has attempted to show that the names sound alike. Plaintiff asserts that the last syllables of the words here are identical and the first two—"Alka" and "Milk-O"—are so similar that if the "O" in "Milk-O-Seltzer" is slurred and the "M" is not pronounced, "Milk-O-Seltzer" comes out "Ilka-Seltzer." Merely relating the steps indicates the weakness of the argument. Moreover, "milk" is a familiar word. Hence, it is extremely unlikely that such mispronunciation would occur.

Plaintiff relies on *G. D. Searle & Co. v. Chas. Pfizer & Co., Inc.*, 7 Cir., 1959, 265 F. 2d 385, where it was held that the name "Bonamine" infringed the name "Dramamine."[13] Even if this court considered the opinion of the Seventh Circuit binding, the facts there are distinguishable from those here, not only because the names there were more similar, but also because there both names were somewhat

[13] The same mark was considered in this district in *G. D. Searle & Co. v. Institutional Drug Distributors, Inc.*, 1955, 151 F. Supp. 715, holding that the name "Dram-A-Mine" was confusingly similar to "Dramamine."

unusual. Hence, a potential buyer, in searching for the right word, might stumble upon the infringing mark. No such unfamiliarity is present here. The word "Alka-Seltzer" is a household word, as are the words "milk" and "seltzer."

Although cognizant of the implication that the court would place a more difficult task of showing confusing similarity upon a trade-mark owner whose mark is very well-known than on one whose mark is unfamiliar, such a difference is inherent in the "confusingly similar" test. The Court is not required to consider the marks in a vacuum, but rather to assess the actions of human consumers in the market place. See *Societe Anonyme, etc.* v. *Julius Wile Sons & Co., supra.*

The only genuine similarity between the marks here is the word "seltzer", as the last syllable of both. As pointed out in *The Upjohn Company* v. *Schwartz*, 2 Cir., 1957, 246 F. 2d 254, 262, such similarity is not uncommon in drug compounds. The word "seltzer" is not registerable since it is a descriptive word. See 15 U. S. C. 1052(e), *Miles Laboratories* v. *Pepsodent, supra.* It was specifically disclaimed in Miles original registrations. Although the Lanham Act contains provisions allowing descriptive marks registration in the "secondary register," and possible trade-mark significance through secondary meaning, such seems unlikely here, *Rohr Aircraft Corporation* v. *Rubber Teck, Inc.*, 9 Cir., 1959, 266 F. 2d 613, 621.

Visual Similarity.

There is no possibility that any purchaser might confuse the two products as now packaged and sold if they were both seen at the market place. See *Skinner Mfg. Co.* v. *General Foods Sales Co., Inc.*, D. C. Neb., 1943, 52 F. Supp.

432, 450.[14] Plaintiff now, and apparently from the first,[15] has packaged its products in an oblong box, upon which the word Alka-Seltzer is written in large white letters against a dark blue background, which background is bordered by a white strip and then a broader powder blue frame. Inside is a long cylindrical jar containing the tablets with a label similar to that on the outside box.[16]

Defendant, on the other hand, packages his product without any outside box, in a brown colored glass bottle with a yellowish label. The shape of the bottle is in no way similar to that of plaintiff. Milk-O-Seltzer is written in dark blue block letters completely dissimilar to the lettering which Alka-Seltzer uses. See *Time, Inc.* v. *T. I. M. E., Inc.*, *supra*, 123 F. Supp. 446, 456; contrast *Sunbeam Lighting Co.* v. *Sunbeam Corporation*, *supra*, 183 F. 2d 969, 971.

Defendant seems purposefully to have avoided visual similarity. Even if anyone were to make the mispronunciations suggested by plaintiff and by mistake order Milk-O-Seltzer, he would undoubtedly reject the latter upon seeing the package.

Plaintiff suggests that unless relief is granted, defendant may change his packaging so as to copy plaintiff. It will be soon enough to decide such a case of "palming off" when it arises.

Similarity of Products.

Unlike the situation in *Time, Inc.* v. *T. I. M. E., Inc.*, *supra*, both products in this case are sufficiently similar so that if the names were genuinely likely to confuse, the injunction would issue. Alka-Seltzer is advertised as an

14. Affirmed 143 F. 2d 895, cert. den. 323 U. S. 766.

15. Plaintiff submitted an exhibit showing examples of its advertising.

16. Plaintiff packages other quantities of Alka-Seltzer, apparently in similar wrappings.

"Effervescent analgesic alkalizing tablet" which is claimed as a cure-all for upset stomach, headache and aching muscles. As sold it appears in white discs which are dissolved in water.

Milk-O-Seltzer is claimed to be an "alkalizing bromide, with aspirin" for "stomach upset, headache and nervous tension." It is sold in powder form which is dissolved in water.

Plaintiff correctly contends that the fact that the products are similar, but not identical, is all the more reason for them to confuse the public, *Miles Laboratories, Inc.* v. *Goodfriend, supra*, 106 U. S. P. Q. 336, 337. Were the names and packaging more similar so that one might appear to be derived from the other, plaintiff's point might be persuasive. It is not here.

Similarity of Customers.

Plaintiff points out that both products might be sold to the same or similar customers and that these customers probably do not exercise particular caution in purchasing. Although the purchasers of patent medicines are "casual" rather than "discerning," *Grove Laboratories, Inc.* v. *Approved Pharmaceutical Corporation*, N. D. N. Y., 1957, 149 F. Supp. 86, 90; Callman, *supra*, vol. 3, pp. 1383-1392, this factor is not decisive unless the names are confusingly similar.

Actual Confusion.

As might be expected from the above discussion and from the fact that Mr. Folich is such a small producer and has been in business for such a short time, plaintiff's counsel, despite meticulous preparation, was not able to cite a single instance of actual confusion. It is familiar trade-mark law that actual confusion or loss is not the

test in determining infringement, *Stork Restaurant, Inc. v. Sahati, supra*, 166 F. 2d 348, 359; *Durable Toy & Novelty Corporation v. J. Chein & Co., Inc.*, 2 Cir., 1943, 133 F. 2d 853, cert. den. 320 U. S. 211, but it has sometimes been pointed out that where actual confusion is shown the second comer must use considerable care in distinguishing his product name, *Horlick's Malted Milk Corporation v. Horlick's, Inc.*, 9 Cir., 1932, 59 F. 2d 13, 16.

PLAINTIFF'S CASE.

In order to show likelihood of confusion, plaintiff relied upon the results of a reaction test, conducted among consumers in the Los Angeles area. Various trained interviewers stopped persons in stores and on the street, showed some a bottle of Milk-O-Seltzer as it would appear on counters, and others, a box upon which a Milk-O-Seltzer label had been affixed (but in neither case was a bottle of Alka-Seltzer shown, nor were the tests conducted near counters where Alka-Seltzer was clearly visible), and asked them: "What other brand name do you think this company uses?" Each of the answers was recorded on a separate sheet and these voluminous exhibits were submitted.

A professor of psychology testified that the method of testing and sampling and selecting and training interviewers was as fair and reasonable as could be devised.

All of this evidence was considered admissible over vague objections of Mr. Frolich. Although there is authority to the contrary, see *The Standard Oil Company v. Standard Oil Company, supra*, 252 F. 2d 65, 75, this court is of the opinion that such evidence is admissible hearsay. As in the *Standard Oil* case, the courts sometimes consider that the credibility of the persons taking the interview, and not that of the subjects who are questioned, is at issue.

However, in order for the evidence to be relevant, the

trier of fact must assume that each of the subjects was telling the truth. In essence, each of the subjects who answered as Miles wished them to answer was saying, "I think that the maker of Milk-O-Seltzer may also make Alka-Seltzer." From these statements, the trier must make the inferential step that the statements were true reflections of the subject's mental reactions. The so-called hearsay dangers evolve from this inferential step since the subjects are not under oath nor in court for cross-examination.

However, it is familiar law that hearsay evidence is admissible to show the state of mind of the extra-judicial declarant, where such is relevant, *Marcalus Manufacturing Co.* v. *Watson*, D. C., 1957, 156 F. Supp. 161, 164, affirmed *Per Curiam* 258 F. 2d 151; *Bridge* v. *Ruggles*, 1927, 202 Cal. 326; and note Rule 43(a) F. R. C. P. Even without this convenient pigeonhole, hearsay is admissible where, as here, there is little danger that all of the subjects would falsify their feelings and it would be impossible for the court to consider the testimony of each. For more detailed analysis, see "Public Opinion Surveys as Evidence: The Pollsters Go To Court", 66 Harv. L. R. 498.

Although admissible, the court does not consider such tests to be persuasive (compare test here with that in *Lever Bros. Co.* v. *Butler Mfg. Co.*, C. C. P. A., 1940, 111 F. 2d 910, 912; see also *Coca-Cola Company* v. *Victor Syrup Corp.*, C. C. P. A., 1954, 218 F. 2d 596, 599; Callman, Unfair Competition and Trademarks, *supra*, vol. 3, pp. 173, 174). The trade-mark Alka-Seltzer is such a common name that it seems likely that any other name combining the word "seltzer" would suggest Alka-Seltzer to a substantial proportion of the population. As has been noted, the word "seltzer" is not registerable.

Again, the court is mindful of the difficult position in

which his last point places the owner of a well-known name in trying to establish evidence of confusion between his name and that of an alleged infringer. Although the test is entitled to some weight, trademark litigation does not consist of a word association game, but rather a balancing consideration between the desirability of preventing possible confusion and the unfettered use of the English language. The latter must give way only when a court decides that there is likelihood of confusion.

Motion Pictures.

Plaintiff made sound motion pictures of some of the reaction test interviews. So long as they are properly authenticated and portray the situations as they actually occurred, the court does not think there is any serious question as to their admissibility, both as to the visual evidence provided and the audio evidence (of equal importance here).[17] Of course, there is always the problem of photographic trickery by which an unscrupulous counsel might distort the pictures or sound, *Harmon* v. *San Joaquin Light & Power Corporation*, 1940, 37 C. A. 2d 169, 174. Here, counsel seemed meticulous in insuring that the pictures were an accurate portrayal of the relevant subjects.

The court considers these pictures no more persuasive than the tests themselves, *supra*.

Defendant's Intent.

Plaintiff questioned why defendant found it necessary to select, with all of the language from which to choose, any name which has even arguable similarity to another

17. For extended discussion of these subjects, see, for motion pictures, 62 A. L. R. 2d 686; for sound reproductions, 58 A. L. R. 2d 1024.

familiar name. Defendant denied that he used the name in order to benefit from the Alka-Seltzer trade-mark.

Intent to deceive the public is not a material element in an allegation for trade-mark infringement, *Stork Restaurant, Inc.* v. *Sahati, supra*, 166 F. 2d 348, 360, although it is necessary to prove intent in order to recover profits or damages under the Lanham Act § 1114(1)(b) where the goods are substantially different. A number of cases state flatly that "evidence of conscious imitation" or "intent of the actor" are important in establishing likelihood of confusion, *Harold F. Ritchie, Inc.* v. *Chesebrough-Pond's, Inc., supra*, 281 F. 2d 755, 758, 759, and cases cited there. This court is unable to find anything in the Act which suggests that the intent of the alleged infringer is relevant, except for the trier of fact to infer that because the second-comer thought he would benefit, he must have expected some confusion as to source. Impliedly, this places him in the position of an expert testifying against himself. See *Maternally Yours* v. *Your Maternity Shop*, 2 Cir. 1956, 234 F. 2d 538, footnote 3, p. 543.

Assuming that defendant's intention is of this limited weight, the court is not convinced that defendant here had such an intention. Mr. Frolich consistently denied any intent to infringe. This intent could be presumed from infringement, *The Standard Oil Company* v. *Standard Oil Company, supra*, 252 F. 2d 65, 76, but to do so here would be circular.

Rather, defendant contended that the name Milk-O-Seltzer was purely descriptive of the product. He testified that his product contained "approximately 63 per cent milk and lactose . . . It tastes like milk; it is milk and seltzer," [Reporter's Transcript, p. 119]. He contends that it was necessary to place the letter "O" between "Milk" and "Seltzer" in order, (1) to have the name non-

descriptive so that it could be listed in the "principal register." See 15 U. S. C. 1052(e); *Brooten v. Oregon Kelp Ore Products Co.*, 9 Cir., 1928, 24 F. 2d 496; *Travel Magazine, Inc. v. Travel Digest*, S. D. N. Y. 1961, 191 F. Supp. 830, 832; and (2), to avoid difficulties with the Pure Food and Drug Administration. Although the court has no desire to decide either of these points, both are arguable. There is no reason why defendant should have incurred the expense and trouble of litigation when the simple expedient here was readily available. See *Canal Co. v. Clark*, 1871, 80 U. S. 311; also, see many cases cited in *Skinner Mfg. Co. v. General Food Sales, Inc.*, *supra*, 52 F. Supp. 432, 445.

It should also be noted that the word "milk" was used extensively throughout defendant's products and advertising, as indicated by his exhibits. Finally, the complete lack of similarity of packaging suggests strongly that defendant had no intent to infringe.

Other Theories.

Having determined that the name "Milk-O-Seltzer" is not confusingly similar to "Alka-Seltzer" within the test of the Lanham Act, and that defendant did not intentionally attempt to infringe plaintiff's trade-mark or deceive the public, it is not necessary to consider possible recovery under California trade-mark law, or state or federal actions for unfair competition. The tests for trade-mark violation are substantially identical. If anything, protection is more easily obtained under the Lanham Act. See *Time, Inc. v. T. I. M. E., Inc.*, *supra*; *Audio Fidelity, Inc. v. High Fidelity Recording*, 9 Cir., 1960, 283 F. 2d 551, 557; *Sunbeam Furniture Corp. v. Sunbeam Corp.*, 191 F. 2d 141, 145, *supra*; *Winfield v. Charles*, 1946, 77 Cal. App. 2d 64; Rest. Torts, 1938, § 717, California annotation, 1957.

CONCLUSION.

Judgment shall be entered denying plaintiff's prayer for injunction and accounting. Defendant may recover the costs of this action.

The foregoing opinion shall serve as findings of fact, conclusions of law and judgment for the purposes of Local Rule 7.

Dated: June 8th, 1961.

s/ M. D. CROCKER,
United States District Judge.

[Endorsed]: Filed and Entered June 9, 1961.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

NO. 812

MILES LABORATORIES, INC.,

Petitioner,

vs.

HENRY J. FROLICH, d b a ENCINO CHEMICALS

Respondent,

RESPONDENT'S OPPOSING BRIEF

HENRY J. FROLICH
17500 Emelita St.
Encino, California
in Propria Persona

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RESPONDENT'S OPPOSING BRIEF

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent, Henry J. Frolich, respectfully prays that this petition for writ of certiorari be denied.

OPPOSING ARGUMENTS

The Respondent must ask relief for not being more formal in this brief as all of the actions in the very checkered career of the Petitioner are conveniently unrecorded.

This is a very simple and childish case. Unless the Petitioner wishes to admit that he has an agreement with the Warner-Chilcott Co. (Alka-Zane since 1856) and the Warner-Lambert Co. (Bromo Seltzer since 1889) who are both one company, there is no case here at all. both of these products are alkaline effervescent compounds as is Alka Seltzer.

The Petitioner (Alka Seltzer since 1930) has no claim to either of the words in their mark, let alone making a mockery of justice by suing everyone else who uses the word "Seltzer" in their mark.

If the Federal Government should want to bring criminal charges against the Petitioner regarding the Sherman Anti-Trust Laws, they should be held separate from this civil action.

Because of the long previous use of the mark "Bromo Seltzer" plus the fact that there are several other products on the market that use the word "Seltzer" in their marks, the Petitioner can in no way claim a "secondary meaning" under the Latham Act.

The Petitioner even sued the United Drug Co. which is part of the Rexall Drug Co., for their use of the mark "Rex Seltzer." The word "Rex" is short for Rexall and is used on several other products in the Rexall Drug Stores. This only proves that the Petitioner sues on the opponents use of the word "Seltzer."

The Petitioner stated in their application for the registration of the mark, Alka Seltzer (U.S. Pat. Office trade-mark # 283-831) quote:

> " . . . has adopted and used the trade-mark shown in the accompanying drawing, no claim being made to the word Seltzer apart from the mark as shown in the drawing . . . "

Milk O Seltzer is the only completely new approach to grandma's old baking soda and aspirin remedy since the inception of sodium bicarbonate and acetylsalisylic acid.

Since the Petitioner sues everyone who uses the word "Seltzer" in their mark, and this statement needs no proof, it can only mean that the Petitioner feels that the public thinks that all of the products on the market that have the word "Seltzer" in their marks, including "Bromo Seltzer," come from the Miles Laboratories, Inc.

It should not have to be proved in a court of this stature that any child who is three years or older, who is not classified as retarded, can recognize the word "Milk" by sound and associate it properly. No respect to Judge Merrill and his very serious lisp.

The Respondent, even if he would be available, is in no position to assume the role of special deputy prosecutor to air out lower court decisions such as the one handed down that apparently "Alka Seltzer"

did not sound like "Bromo Seltzer" but that "Foam O Seltzer" sounded just like "Alka Seltzer."

The Respondent, in this action, does not feel that he should be held responsible for the stupidity (and that is putting it mildly) of some of the courts and judges in this country.

The Respondent repeats. There are several products on the market that are similar to, or almost exactly like, Alka Seltzer and use the name "Seltzer" in their registered trade-marks.

The Respondent feels that he should not have to press further regarding this action so will only ask that the petition number 812 be unanimously denied.

Respectfully submitted,

HENRY J. FROLICH
17500 Emelita St.
Encino, California
in Propria Persona

April 16, 1962